ATTORNEY FOR APPELLANT:

KENNETH R. MARTIN
Goshen, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ANN L. GOODWIN
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

KARIM JABR AL AZAWI,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0803-CR-95
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0612-FA-00066

August 15, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Karim Jabr Al Azawi ("Al Azawi") was convicted in Elkhart Superior Court of Class A felony child molesting and Class C felony child molesting and was sentenced to fifty years incarceration. Al Azawi appeals and argues: (1) that the evidence is insufficient to support his convictions, and (2) that his sentence is inappropriate.

We affirm.

Facts and Procedural History

On Saturday, December 9, 2006, A.S., who was then almost four years old, and her six-year-old brother were staying with their father, Al Azawi.[1] A.S. spent most of the evening at the home of Al Azawi's girlfriend, Tammy Pruitt, who lived in the apartment next door to Al Azawi. Al Azawi and his son went to his apartment, but returned to Pruitt's apartment at approximately 1:00 a.m. to spend the night. On Sunday, December 10, 2006, Al Azawi woke up at approximately 10:00 a.m. and returned to his apartment with his son. Between noon and 1:00 p.m., A.S. returned to her father's apartment. The mother of A.S. and S.S. returned to pick up the children at approximately 7:00 p.m. that evening.

Within a few hours of returning home with her mother, A.S. grabbed the area between her legs and complained that her vagina hurt. Her mother examined the area and noticed that it was red and irritated. A.S.'s mother then asked if anyone had touched A.S. in that area, and she replied, "Yeah. Daddy." Tr. Vol. 2, p. 49. Using a doll, A.S.

[1] After his conviction, but before his sentencing, Al Azawi denied that A.S. was his biological daughter, but admitted that no paternity testing had been done to disestablish his paternity. In his appellant's brief, Al Azawi admits that the facts most favorable to the conviction establish that he is A.S.'s father.

indicated to her mother that Al Azawi had touched her vagina with his hand. A.S. also told her mother that Al Azawi had "pee-peed" in her mouth. Id. at 50.

The next morning, A.S.'s mother took her to the emergency room where A.S. was seen by Dr. Jonathan Shenk. Dr. Shenk testified that the exam was normal "except there was redness. There was redness in the area of the perineum, in the area right around the sexual organ. It went down as far as the anus and there was no, no tears or bruising[,] but there was some redness." Id. at 78. Dr. Shenk also agreed that the redness he observed could be "consistent with some sort of friction being applied by an object to the vulva area," and that this object could have been either a penis or a finger. Id. at 80-81. Dr. Shenk diagnosed A.S. with "possible sexual abuse," and contacted Child Protective Services. Id. at 81. This led A.S.'s mother to contact the police.

A.S was then taken to speak with Gayla Konanz, a forensic interpreter, who conducted a video-recorded interview. A.S. told Ms. Konanz that Al Azawi had touched her vagina with his finger and penis. A.S. also told Ms. Konanz that Al Azawi had done something involving her mouth and his penis, such that Al Azawi "peed" in her mouth.

On December 27, 2006, the State charged Al Azawi with Class A felony child molesting, alleging that he had performed deviate sexual conduct on A.S, and Class C felony child molesting, alleging that Al Azawi fondled A.S. At trial, A.S. testified that Al Azawi had touched the area between her legs with his hand and that Al Azawi had "peed" on her face. Id. at 97. The jury found Al Azawi guilty as charged.

At a sentencing hearing held on November 29, 2007, the trial court identified as aggravating the following circumstances: that Al Azawi had two prior felony convictions

and four misdemeanor convictions; that Al Azawi was on probation at the time of the instant offenses; that Al Azawi violated a position of trust by molested a girl who, at the very least, considered Al Azawi to be her father; and that A.S. was of a tender age, which made it more difficult for her to avoid Al Azawi or report what had happened. The trial court found Al Azawi's sporadic employment history to be a low-level mitigating circumstance. Concluding that the aggravators outweighed the mitigator, the trial court sentenced Al Azawi to fifty years on the Class A felony conviction to be served concurrently with eight years on the Class C felony conviction. Azawi now appeals.

I. Sufficiency of the Evidence

When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the judgment and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

Al Azawi first claims that A.S. is so young that her testimony should be suspect, citing Matthews v. State, 515 N.E.2d 1105 (Ind. 1987), and Allgire v. State, 575 N.E.2d 600 (Ind. 1991). However, neither of these cases is directly on point. Matthews involved the admissibility of a child witness's hearsay statement. See 515 N.E.2d at 1106 n.2. Allgire involved the propriety of expert testimony regarding the issue of the reliability of child testimony, and the portion of Allgire he cites is not the majority opinion. See 575 N.E.2d at 610 (Dickson, J., concurring). Our supreme court has more recently stated that

the testimony of a child victim, even if uncorroborated, is ordinarily sufficient to sustain a conviction for child molesting. Bowles v. State, 737 N.E.2d 1150, 1152 (Ind. 2000). And here, A.S.'s testimony was corroborated by medical evidence indicating that she may have been molested.

Al Azawi also claims that there was "an extremely limited time frame" within which his offenses could have occurred. Br. of Appellant at 11. However, the evidence he refers to consists mostly of the testimony of his girlfriend, Tammy Pruitt. Upon appeal, we are constrained to consider only the evidence favorable to the convictions. Jones, 783 N.E.2d at 1139. The State notes that Al Azawi cared for his daughter by himself for approximately six hours on December 10, 2006, and Al Azawi admits that there was time when he was alone with his daughter. Al Azawi claims, however, that this would have been during the daytime, whereas A.S. testified that the molestation occurred at night.

A.S. did testify that Al Azawi touched her while the two were in bed and were "going to sleep." Tr. p. 100. She also replied "Yeah," when Al Azawi's trial counsel asked during cross-examination, "When you were going to sleep. When you were going to sleep at night?" Tr. p. 100. Again, this is evidence which is not favorable to the conviction. Furthermore, to the extent that Al Azawi now complains that A.S.'s testimony contained inconsistencies, we have observed before that it is "not surprising that a young child in an adversary courtroom setting may demonstrate a degree of confusion and inconsistency." Hill v. State, 646 N.E.2d 374, 378 (Ind. Ct. App. 1995); see also Lowe v. State, 534 N.E.2d 1099, 1100 (Ind. 1989) (stating that it is not surprising

that a thirteen-year-old girl, who was being cross-examined by a veteran defense attorney, would become confused at times while testifying). Thus, any inconsistencies in A.S.'s testimony were for the jury to consider. See Beckham v. State, 531 N.E.2d 475, 476 (Ind. 1988) (question of whether child victim's testimony, which was inconsistent at times, was to be believed was for the jury to determine).

Al Azawi also claims that there is a possibility that A.S. was responding to coaching or leading questions asked by her mother. Once again, this goes to the credibility of A.S. as a witness, an issue which was within the province of the jury.[2] See Jones, 783 N.E.2d at 1139. Ultimately, Al Azawi's arguments are little more than a request that we reweigh the evidence, which we will not do. See id.

Issues of A.S.'s credibility aside, Al Azawi claims that there was no evidence that he performed or submitted to deviate sexual conduct because, he contends, that there was insufficient evidence of penetration. "Deviate sexual conduct" is defined by statute to mean either (1) an act involving "a sex organ of one person and the mouth or anus of another person" or (2) "the penetration of the sex organ or anus of a person by an object." Ind. Code § 35-41-1-9 (2004). Proof of even the slightest penetration is sufficient to sustain convictions for child molesting. Spurlock v. State, 675 N.E.2d 312, 315 (Ind.

[2] Although not specifically framed as such, Al Azawi's attacks on A.S.'s credibility could be a reference to the "incredible dubiosity" rule. Application of this rule is limited to situations where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the defendant's guilt. Thompson v. State, 765 N.E.2d 1273, 1274 (Ind. 2002). Application of this rule is rare, and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it. Love v. State, 761 N.E.2d 806, 810 (Ind. 2002). Here, A.S. was not the sole witness, there was not a complete lack of circumstantial evidence, and A.S.'s testimony, despite any inconsistencies, was not inherently improbable. The incredible dubiosity rule is therefore inapplicable.

1996), aff'd in relevant part on reh'g (1997). There is no requirement that the vagina be penetrated, only that the female sex organ, including the external genitalia, be penetrated. Smith v. State, 779 N.E.2d 111, 115 (Ind. Ct. App. 2002), trans. denied. The definition of the term "object" includes a finger. D'Paffo v. State, 778 N.E.2d 798, 802 (Ind. 2002).

Here, there was evidence that Al Azawi engaged in conduct which would fit within either definition of deviate sexual conduct. A.S. stated that Al Azawi did something to her mouth and that he "peed" in her mouth. From this, the jury could reasonably conclude that Al Azawi placed his penis near or in A.S.'s mouth and either urinated or ejaculated. This would constitute deviate sexual conduct.

There was also evidence from which the jury could reasonably conclude that Al Azawi penetrated A.S.'s sex organ with his finger. A.S. stated that Al Azawi touched her genital area. Both A.S.'s mother and Dr. Shenk testified that A.S.'s vaginal area was red and irritated. This is sufficient evidence from which the jury could infer that Al Azawi touched A.S.'s pubic area with his finger and penetrated at least her external genitalia. See Simmons v. State, 746 N.E.2d 81, 87 (Ind. Ct. App. 2001) (jury may infer penetration from circumstantial evidence such as physical condition of the victim soon after the incident in question), trans. denied.

Lastly, A.S. explained to Gayla Konanz, the forensic interpreter, that Al Azawi touched her in her genital area with his penis. This too, when viewed in conjunction with the medical evidence, is evidence from which the jury could reasonably conclude that Al Azawi penetrated A.S.'s external genitalia with his penis. However, even if the evidence was insufficient to establish that Al Azawi penetrated A.S. with his penis, there was at

least evidence that he touched her with his penis with the intent to arouse or gratify his sexual desire, as charged in the Class C felony.

In sum, Al Azawi's attacks on A.S.'s credibility are unavailing, and the evidence is sufficient to support Al Azawi's convictions for Class A and Class C felony child molesting.

II. Appropriateness of Sentence

Al Azawi claims that the sentence imposed by the trial court was inappropriate. Pursuant to Indiana Appellate Rule 7(B), this court may revise a sentence otherwise authorized by statute if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. On appeal, it is the defendant's burden to persuade us that the sentence imposed by the trial court is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

The trial court sentenced Al Azawi to the maximum sentence of fifty years on the Class A felony conviction and to the maximum sentence of eight years on the Class C felony conviction and ordered the sentences to be served concurrently. The maximum possible sentences are generally most appropriate for the worst offenders. Buchanan v. State, 767 N.E.2d 967, 973 (Ind. 2002). This is not, however, an invitation to determine whether a worse offender could be imagined, as it is always possible to identify or hypothesize a significantly more despicable scenario, regardless of the nature of any particular offense and offender. Id. In stating that maximum sentences are ordinarily appropriate for the worst offenders, we refer generally to the class of offenses and

offenders that warrant the maximum punishment. Id. But this encompasses a considerable variety of offenses and offenders. Id. We concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character. Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), trans. denied.

The nature of Al Azawi's offenses is particularly repulsive. He sexually abused a three year old child. Cf. Garland v. State, 855 N.E.2d 703, 710 (Ind. Ct. App. 2006) (noting that trial court may properly rely upon fact that victim was of tender years to enhance sentence), trans. denied. Moreover, the child was Al Azawi's own daughter or, at the very least, considered Al Azawi to be her father. In molesting her, Al Azawi abused a position of trust. Cf. Hart v. State, 829 N.E.2d 541, 544 (Ind. Ct. App. 2005) (noting that abusing a position of trust is a valid reason to enhance a sentence and that there is no greater position of trust than that of a parent to his own young child). Thus, the nature of Al Azawi's offense supports the imposition of an enhanced sentence.

Al Azawi's character also weighs in favor of an enhanced sentence. Al Azawi immigrated to the United States in 1997, and at the time of the commission of the instant offenses, had been in this country for less than ten years. Yet he had already been convicted of two felonies: Class D felony driving while intoxicated and Class D felony escape, and four misdemeanors: public intoxication, public indecency, reckless driving, and driving while intoxicated. In his prior dealings with the criminal justice system, Al

Azawi has failed to appear for court dates and repeatedly violated the terms of his probation. Indeed, he was on probation at the time he committed the instant offenses.

Under these facts and circumstances, we conclude that Al Azawi is among the class of offenders and that his crimes are among the class of offenses, that warrant the maximum punishment. Therefore, after giving due consideration to the trial court's sentencing determination, we cannot say that the fifty-year aggregate sentence imposed by the trial court was inappropriate in light of the nature of the offense and the character of the offender.

Conclusion

The evidence was sufficient to support Al Azawi's convictions for child molesting, and the fifty-year sentence imposed by the trial court was not inappropriate.

Affirmed.

MAY, J., and VAIDIK, J., concur.